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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 271

JAMES H. QUARLES, *Petitioner*

v.

THE STATE OF TEXAS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI
To the Court of Criminal Appeals for the State of Texas

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SUBJECT INDEX

	Page
Jurisdiction	2
Opinions Below	2
Questions Presented	2
Statutory and Constitutional Provisions Involved	5
Statement of the Case	7
Presentation of Federal Questions in the State Courts	8
Reasons For Granting Writ	9
Conclusion	12
Certificate of Service	12
Appendix "A"	13
Appendix "B"	15

LIST OF AUTHORITIES

CASES	Page
N.A.A.C.P. v. Button, 371 U.S. 415, 9 L.Ed.2d 405, 83 S.Ct. 328	3
Quarles v. State Bar of Texas, 316 S.W.2d 797	2
New York ex rel. Bryant v. Zimmerman, 278 U.S. 64, 67	9
Ackerman v. State, 61 S.W.2d 116	8
Wilkins v. State, 122 Crim. 590, 57 S.W.2d 120	9
Crowell v. State, 147 Crim. 299, 180 S.W.2d 343	9
Hayes v. Pennock, Civ.App. 192 S.W.2d 169	11
Scherpig v. State, 112 Crim. 61, 13 S.W.2d 872	11

Page

UNITED STATES CONSTITUTION

1st Amendment 2, 4, 6
5th Amendment 2, 4, 6
6th Amendment 4, 7
14th Amendment 2, 4, 7

UNITED STATES STATUTES

28 U.S.C. 1257(3) 2

TEXTS

V.A.P.C., Art. 5207A, Sec. 1 2
V.A.P.C., Art. 430 ..... 2, 4, 9, 10, 12

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PETITION FOR A WRIT OF CERTIORARI
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To The Honorable The Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

Your Petitioner James H. Quarles, respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court to review the decision of the Court of Criminal Appeals for the State of Texas, rendered December 2, 1964, which upheld the judgment of the County Court at Law of Nueces County, Texas convicting Petitioner of a misdemeanor, to-wit: Barratry.

JURISDICTION

Jurisdiction to review this case upon Writ of Certiorari is conferred upon this Court by 28 U.S.C. 1257 (3). The opinion of the Court of Criminal Appeals for the State of Texas was filed on December 2, 1964. Motion for Rehearing was overruled January 20, 1965 and application for Stay of Mandate was denied by that Court on January 21, 1965.

OPINIONS BELOW

The judgment of the trial court is printed in Appendix "A" hereto, infra, p. 13 and also a copy appears in the record. The opinion of the Court of Criminal Appeals is printed in Appendix "B" hereto, infra, p. 15 and also a copy appears in the record.

QUESTIONS PRESENTED

(1) Whether Article 430 of Vernon's Anotated Penal Code of Texas, hereinafter referred to as the Barratry Statute of the State of Texas, is unconstitutional, in whole or in part, in so much as it deprives Petitioner of: the freedom of speech; the right to freedom of expression; the right to seek employment as an investigator by means of personal solicitation; the right of life, liberty and property without due process of law; the freedom to contract; the freedom to contract for investigative services on a contingent fee basis; as guaranteed to Petitioner by the First, Fifth and Fourteenth Amendments to the Constitution of the United States of America, and by Art. 5207A, Sec. 1, V.A.P.C., the decision of the Court of Civil Appeals in *Quarles v. State Bar of Texas*, 316 S.W.2d 797 and this

Court's opinion in *N.A.A.C.P. v. Button,* 371, U.S. 415, 9 L.Ed.2d 405, 83 S.Ct. 328.* (R. p. ____)

* In it's Opinion in N.A.A.C.P. v. Button, 371 U.S. 415, 9 L.Ed.2d 405, 83 S.Ct. 328, this Honorable Court has held . . . . "the objectionable quality of vagueness and overbreadth in a statute does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application . . . . . Because First Amendment freedoms need breathing space to survive, and the threat of sanctions may deter their exercise almost as potently as actual application of sanctions, government may regulate in the area only with narrow specificity . . . . . A state statute which has so broad and uncertain a meaning that it can be applied to deprive persons of First Amendment rights is unconstitutional whether or not such prosecutions or proceedings would actually be commenced, and whether or not the highest court of the state expressly confirms the right to advocate civil rights litigation . . . . . only a compelling state interest in the regulation of a subject within the state's constitutional power to regulate can justify limiting First Amendment freedoms . . . . a state may not, under the guise of prohibiting professional misconduct, ignore constitutional rights . . . . a state court decree upholding the validity of a state statute may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the record discloses that the party challenging the statute has engaged in privileged conduct, for in appraising a statute's inhibitory effect upon such rights the United States Supreme Court will not hesitate to take into account possible applications of the statute in other factual contexts besides that at bar". . . . and further and more specifically, the Court has held . . . . . "a state statute which makes it a crime (1) to advise another that his legal rights have been infringed and to refer him to a particular attorney or group of attorneys for assistance, or (2) knowingly to render legal assistance to the person thus referred, cannot be justified under the state's interest in regulating the traditionally illegal practices of barratry, maintenance, and champerty, and such a statute limits First Amendment freedoms and violates the Fourteenth Amendment by unduly inhibiting protected freedoms of expression and association . . . . . Malicious intent is of the essence of the common-law offenses of fomenting or stirring up litigation, and as a matter of law the exercise of First Amendment rights for enforcement of constitutional rights through litigation cannot be deemed malicious".

(2) Whether the Barratry Statute of the State of Texas is unconstitutional in that it is so vague and indistinct as to encourage its use in areas of governmental regulation that would deprive individuals, and more specifically your Petitioner, of First Amendment freedoms.

(3) Whether Petitioner was granted a fair and impartial trial as guaranteed by the Constitution of the United States, particularly the Sixth Amendment thereto, when a witness testified in the trial in the County Court that a member of the prosecutor's staff altered an affidavit which was used as a basis for one of the indictments (S.F. p. 201) and further, when the trial judge permitted the rule of privilege to be invoked for the purpose of preserving a civil action or claim for damages for the witness (S.F. p. 178).

(4) Whether the Court of Criminal Appeals for the State of Texas gave a fair and unbiased opinion in this case, as guaranteed by the Constitution of the United States, in that they refused to answer the points of error raised by this Petitioner and failed and refused to rule by the precedent and authority submitted by Petitioner in his Brief and Supplemental Brief.

(5) Whether the due process clause of the Fifth and Fourteenth Amendments to the Constitution of the United States of America guarantees the accused the right to cross examine a witness, to the extent and for the purpose of proving his (the accused's) innocence by such examination, without the Court permitting the rule of privilege to be invoked for any reason and specifically for the purpose of preserving a civil action or claim for damages for the witness (S.F. p. 178) when a thing so great as the liberty and constitutional rights of Petitioner are at stake.

(6) Whether the evidence in the trial was sufficient to establish beyond a reasonable doubt that Petitioner was guilty of the charges brought against him.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Article 430, V.A.P.C.

> Whoever shall, for his own profit or with the intent to distress or harass the defendant therein, wilfully instigate, maintain, excite, prosecute or encourage the bringing, in any court of this State, of a suit at law or equity in which he has no interest; or shall, for his own profit or with such intent, wilfully bring or prosecute any false suit of his own at law or equity; or shall wilfully instigate, maintain, excite, prosecute or encourage the bringing or prosecution of any claim in which he has no interest, for his own profit or with the intent to distress or harass the person against whom such claim is brought or prosecuted; or shall seek to obtain employment in any claim to prosecute, defend or collect the same by means of personal solicitation of such employment, or by procuring another to solicit for him employment in such claim; or shall, by himself or another seek or obtain such employment by giving, directly or indirectly, to the person from whom the employment is sought, money or other thing of value, or shall, directly or indirectly pay the debts or liabilities of the person from whom such employment is sought, or who shall loan or promise to give, loan or otherwise grant money or other valuable thing to the person from whom such employment is sought before such employment whether the same be done directly by him or through another; or any attor-

ney at law who shall seek or obtain employment in any suit or case at law, or in equity, to prosecute or defend the same by means of personal solicitation of such employment, or by procuring another to solicit for him employment in such cases; or who shall, by himself or another, seek or obtain such employment by giving directly or indirectly to the person from whom employment is sought money or other thing of value, or who shall directly or indirectly pay the debts or liabilities of the person from whom such employment is sought, or who shall loan or promise to give, loan or otherwise grant money or other valuable thing to the person from whom such employment is sought, before such employment, in order to induce such employment, whether the same shall be done directly by him or through another, shall be fined not to exceed five hundred dollars, and may in addition thereto be imprisoned in jail not exceeding three months. The penalties herein prescribed shall apply not only to attorneys at law, but to any other person who may be guilty of any of the things set forth in this article. The term attorney shall include counsel at law.

UNITED STATES CONSTITUTION, First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

UNITED STATES CONSTITUTION, Fifth Amendment, provides in relevant part . . .

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived

of life, liberty, or property, without due process of law . . .

UNITED STATES CONSTITUTION, Sixth Amendment, provides in relevant part . . .

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him . . .

UNITED STATES CONSTITUTION, Fourteenth Amendment, provides in relevant part . . .

". . . no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The State of Texas, Respondent herein, acting by and through the County of Nueces, on January 21, 1964, filed in the 105th Judicial District Court five indictments charging Petitioner with 'Barratry'. Shortly thereafter the indictments were transferred to the County Court at Law No. 1 of Nueces County, Texas. Thus far, Petitioner has been tried on one of these indictments, a photocopy of which is attached to Petitioner's Motion for Rehearing which is a part of the record of this case.

During the trial, Respondent brought forward four witnesses to persuade the jury that Petitioner was guilty of the charge of 'Barratry' and more specifically of seeking to obtain employment to collect a claim by means of

personal solicitation of such employment and on April 8, 1964, the jury rendered a verdict of guilty and, accordingly, Petitioner was fined a total of $500.00 plus costs, and sentenced to ninety days in jail, the maximum possible penalty, which he is now serving.

Petitioner timely filed an appeal before the Court of Criminal Appeals of Texas. Said Court, in its ruling of December 2, 1964, affirmed the judgment of the trial court. Appellant's (Petitioner's) Motion for Rehearing, timely and properly filed with the Court of Criminal Appeals of Texas, was overruled without written opinion on January 20, 1965 and on January 21, 1965 a Motion for Stay of Mandate was refused. Petitioner's Motion to Enlarge Time in which to File Writ of Certiorari was granted by Justice Hugo Black on April 13, 1965 for a period of thirty days and this time was further extended an additional thirty days on May 14, 1965, up to and including June 19, 1965.

PRESENTATION OF FEDERAL QUESTIONS IN THE STATE COURTS:

County Court at Law No. 1, Nueces County, Texas

Prior to the taking of any testimony, Petitioner made his exceptions to the indictment and/or information and to the barratry statute as a whole (Tr. p. 10). Other constitutional points of objection were raised in his Amended Motion (Tr. p. 18-27). Petitioner further urged that Respondent failed to establish the allegations of their complaint beyond a shadow of a doubt (Tr. p. 18-27; S.F. p. 184) as is fundamentally exacted in all criminal prosecutions (*Ackerman v. State* 61 S.W.2d 116). The fact that Petitioner objected to the manner in which the

charges were brought against him and the purpose behind such charges (*Wilkins v. State* 122 Crim 590, 57 S.W.2d 120; *Crowell v. State* 147 Crim. 299, 180 S.W.2d 343) was pointedly brought to the Court's attention (S.F. p. 111-117) (Tr. p. 18-27).

Though the federal basis is not spelled out verbatim, the record as a whole shows by clear intendment that the federal claim and the grounds therefor were brought to the trial Court's attention with fair precision. (*New York ex. rel. Bryant v. Zimmerman*, 278 U.S. 63, 67).

Court of Criminal Appeals of Texas

Appellant's (Petitioner's) Brief, Supplemental Brief and Motion for Rehearing explicitly alleges and sets out the violations of the Constitutional rights of Petitioner prior to, during and after the trial of this case. Specifically referred to are Appellant's (Petitioner's) Brief, Points of Error No. 1, 7, 11, 12, 13, 14, 20 and 21; Supplemental Brief for Appellant, reference No. 10, 12, 19b, 19c, 22a, 22d, 22e, 22f, 30a, and 30c; and to the Motion for Rehearing, par. XVII.

REASONS FOR GRANTING WRIT

1. The questions raised herein are primarily based on whether or not certain of Petitioner's rights, as guaranteed to him by the Constitution of the United States of America and various Amendments thereto, are being violated by Article 430, V.A.P.C. The interpretation which has been given to this Article, by the judiciary bodies of the State of Texas and others interested in using it to their own advantage and as a wedge against the prosperity and freedoms of others, has brought about a broad area of

injustice being imposed upon the citizens of the State of Texas, and particularly upon Petitioner, by the very people who are sworn to protect them and the rights that are guaranteed to them by the Constitution of the United States of America and the various Amendments thereto. Petitioner contends that Article 430, V.A.P.C., especially as interpreted by the State of Texas, does violate his (a) right of freedom of speech, (b) right of freedom of expression, (c) right to seek employment as an investigator by means of personal solicitation, (d) rights to life, liberty and property without due process of law, (e) right to contract, and (f) right to contract for investigative services on a contingent fee basis; all as shown by the records of this case.

2. The facts of this case present pertinent questions regarding the extent to which a person may speak and act without committing barratry. Settlement of these questions by this Honorable Court is plainly in the public interest. The freedom of expression and the freedom to contract are traditionally considered to be assets of paramount value, granted freely by the laws of this land to its people. Yet Respondent herein, supposedly a part of a protective State government, would so suppress these freedoms, as they relate particularly to Petitioner, that he would be denied his livelihood, derived by working as an investigator who gains employment by contracting with clients to do investigations on a contingent fee basis.

3. Testimony in this case does not disclose proof beyond a reasonable doubt that Petitioner actually is guilty of the charges brought against him. Rather, testimony shows that the witnesses were not only prejudiced but hostile toward Petitioner (S.F. p. 41, 207-217) Testimony of M. S. Mac-

Kenzie clearly shows the intent of his and Petitioner's visits to various homes referred to in other testimony (S.F. p. 226). The testimony of Eva Nell Hentges, from whom Petitioner allegedly solicited employment to collect a claim, clearly shows that she was testifying (a) to things which she *thought* to be true rather than things which she *knew* to be true (S.F. p. 14-15; 18, 47, 48); (b) that Petitioner did in fact seek to do the investigation for her (S.F. p. 37); (c) that Petitioner did not recommend any attorneys (S.F. p. 40) and (d) that she was confused and unaware of the difference between the work of an investigator and the work of an attorney (S.F. p. 20, line 15 and p. 21, line 1 and line 14-16; p. 20, line 10 and p. 21, line 14-16; p. 21, line 19-25 and p. 22, line 9-14; p. 14, line 13-16 and p. 23, line 7-10, comparatively).

Further, in spite of the fact that the rule of privilege does not extend to third persons in a conversation (*Hayes v. Pennock*, Civ.App. 192 S.W.2d 169; *Scherpig v. State* 112, Crim. 61, 13 S.W.2d 872), testimony of Mr. Alex G. Schkade was not allowed when this rule was invoked (S.F. p. 178).

4. The Court of Criminal Appeals, in its Opinion, merely stated that the lower court did not err "in permitting the State to prove that appellant solicited contingent fee contracts of employment from persons other than the Eva Nell Hentges named in the indictment" without mentioning that Petitioner had been charged with such solicitation "to collect a claim" or without ruling on whether or not the proof had been sufficient to prove that Petitioner had been guilty of such solicitation for the purpose of 'collecting a claim' rather than just soliciting employment. Further, its comments on the constitutionality

of Article 430, V.A.P.C. were vague and without specific comment or elaboration.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should in all things be granted.

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CERTIFICATE OF SERVICE

Two copies of the foregoing Petition for Writ of Certiorari have this day been served on the Hon. Waggoner Carr, Attorney General for the State of Texas, Austin, Texas by mailing same U. S. Mail on this the _____ day of June, 1965.

APPENDIX "A"

NO. 27,362

THE STATE OF TEXAS
v.
JAMES H. QUARLES

IN THE COUNTY COURT AT LAW
NO. 1 OF NUECES COUNTY
TEXAS

J U D G M E N T

On this, the 8th day of April, 1964, the above entitled and numbered cause came on to be heard, and both parties appeared in open Court and announced ready for trial; and the Defendant, James H. Quarles, pleaded "Not Guilty" to the information herein; and a jury composed of Theodore W. Painter and five others was duly selected, empaneled and sworn, who, having heard the information read, and the Defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, retired to consider of their verdict, and afterward returned into Court in due form of law the following verdict, which was received by the Court and is here now entered upon the minutes, to-wit:

> "We the jury, find the defendant, James H. Quarles, guilty of Barratry and assess his punishment at Five Hundred Dollars ($500.00) fine and ninety days (90) in the County Jail.
>
> /s/ Theodore W. Painter
> Jury Foreman"

It is therefore CONSIDERED, ORDERED and ADJUDGED by the Court that the State of Texas do have and recover of the Defendant, James H. Quarles the said fine of $500.00 and all costs, and the said Defendant, being now present in Court, be committed to the custody of the Sheriff, who shall forthwith confine him in the jail of Nueces County for 90 days from this date, and until said fine and costs are fully paid.

SIGNED AND ORDERED ENTERED this 8th day of April, 1964.

/s/ Vernon D. Harville, Judge
County Court at Law No. 1

APPENDIX "B"

James H. Quarles, Appellant

NO. 37,285 v. --- Appeal from Nueces County

The State of Texas, Appellee

OPINION

The offense is barratry; the punishment, 90 days in jail and a fine of $500.00.

In October, 1963, an explosion occurred at a refinery in Corpus Christi. Several workers were killed and others were seriously injured. On that day appellant and his co-indictee, MacKenzie, left Houston, went to Corpus Christi, secured lodgings at a motel, a map of the city and a newspaper which carried the names and addresses of those who had been killed and injured, located them on the map and the next morning visited a number of the victim's wives.

As to what transpired during these visits, we need only quote from the testimony of two witnesses. Mr. Timon, who was at the home of his daughter whose husband was killed in the explosion at the time of appellant's visit, testified that appellant and MacKenzie came inquiring for his daughter but that he spoke to them and that appellant said, "we are attorneys" from Houston and that they wanted to represent his daughter in her claim against Coastal States. Appellant further told him "We do this all the time. I have won several of them. I can show you clippings." Upon being told that Mr. Timon had counsel of his own choosing, the two left.

Mr. Schkade, who was at the home of his sister whose husband had been killed in the explosion, testified that appellant and MacKenzie came there and appellant stated that he represented a law firm from Houston and would like to represent her. He testified that appellant further stated that he would handle his sister's claim for 15 percent of all she might recover over and above her deceased husband's Workman's Compensation, but that Corpus Christi lawyers would probably charge her 33-1/3 percent including the Workman's Compensation claim. He stated that appellant asked his sister to sign a contract and exhibited newspaper clippings which he said contained accounts of awards that he had been able to recover in previous cases and told his sister that he might be able to get her an award of from $200,000 to $250,000, but that his sister refused to sign the contract.

Appellant did not testify in his own behalf, but called his co-indictee who testified that he was a private investigator in Houston and had accompanied appellant to Corpus Christi and on the visits to the various families of those who had been injured, but that appellant was unable to get anyone to sign a contingent fee contract with him. On cross examination he agreed that while appellant was talking to the parties, "a question was raised" in his mind, and he felt like he was "mixed up in something you (he) didn't want any part of."

Appellant also introduced into evidence the opinion of the Court of Civil Appeals at Houston in Quarles v. State Bar of Texas, 316 S.W.2d 797.

Appellant represented himself in the trial court and this Court. There is no question of his indigency.

He raises several questions. He complained in the trial court and here that he was prosecuted for this misdemeanor under an indictment returned by the Grand Jury of Nueces County.

There can be no question that a grand jury may return an indictment charging a misdemeanor. Article 419 V. A. C. C. P. We need not pass upon appellant's contention that the State Bar Act (Article 320a-1 V.A, R.C.S.) is unconstitutional because Article 430 V.A.P.C. concludes with the following sentence: "The penalties herein prescribed shall apply not only to attorneys at law, but to any other person who may be guilty of any of the things set forth in this article."

He complains that he does not have before this Court a copy of the argument of the prosecutor. The trial court granted him a 60 day extension of time to secure the same from the court reporter who took down the argument and this Court granted him an additional delay to see if he could procure the same, but none has been forthcoming. Again it should be noted that there is no question raised as to appellant being indigent. The court reporter was well within her rights in requiring payment of her fee as a condition precedent to the delivery of a transcript of the argument since no pauper's oath had been filed. Maxfield et al. v. Pure Oil Co., et al., 74 S.W. 2d 145.

Clearly the trial court was correct in sustaining the State's objections to questions which would have elicited information as to privileged communications between attorney and client or disclosed testimony which had been given in the secrecy of the Grand Jury.

We overruled appellant's contention that Article 430 V.A.P.C. which denounced the offense of Barratry is unconstitutional. Ex Parte McCloskey, 199 S.W. 1101; McCloskey v. Tobin, 252 U.S. 107, 64 L.Ed. 481, 40 S.Ct. 306.

The court did not err in permitting the State to prove that appellant solicited contingent fee contracts of employment from persons other than the Eva Nell Hentges named in the indictment. Lanier v. State, 356 S.W.2d 671. See also the annotation at 78 ALR 2d 1359.

Finding the evidence amply sufficient to support the conviction and no reversible error appearing, the judgment is affirmed.

Morrison, Judge

(Delivered December 2, 1964)